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No Moaning of the Bar

THE appointment of Lord Justice PARKER to succeed LORD GODDARD as Lord Chief Justice of England is admirable in every way. We congratulate his lordship and wish him a long and successful career in his new office. Lord Justice Parker was junior counsel to the Treasury for five years after the war, a judge of the High Court from 1950 until 1954, and since 1954 has been a Lord Justice of Appeal. This appointment must surely mark the end of the tradition, real or imaginary, that the law officers of the Crown have a kind of conventional right of succession when senior judicial offices fall vacant. It has been generally assumed that such a tradition exists, although in the *Sunday Times* last week a writer was able to show that the factual basis for the tradition is not as deep as it had been imagined. The strength of a tradition, however, often lies in popular belief and not in objective fact. The situation is now in perspective. The best man must be chosen by learning, temperament, character, experience and age. Political office should be neither a hindrance nor an advantage. While political activity ought never to be a short cut to the Bench, equally it should not be a *cul de sac*.

Racial Disturbances

WE hesitate before making any comment on the recent racial disturbances in Notting Hill and Nottingham as, in our view, it is difficult if not impossible for those who do not live in these areas to pass judgment in a matter of which they have little first-hand knowledge or experience. It is much easier to condemn these riots than to understand them. There can be no doubt, of course, that very few people in this country would wish to see Little Rock built " in England's green and pleasant land " and that all shades of public opinion are united in the censure of anti-colour demonstrations. Moreover, we do not dispute the assertion of the CHIEF CONSTABLE OF NOTTINGHAM that those primarily concerned were " irresponsible Teddy boys and persons who had had a lot to drink," but it is also a fact that there are many people of good will, both white and black inhabitants of the areas which now have large populations of coloured people, who are sorely tried by their present situation. For the moment we find some measure of comfort in the HOME SECRETARY'S assurance that the scope of the incidents is within the power of the police to control and that the Government does not intend to allow the atmosphere of unrest to rush them into making decisions of far-reaching consequence, particularly with regard to the restriction of immigration by law. We share his hope that in a " calm and sensible way . . . we shall reach a typical British solution without doing violence to

CONTENTS

our British tradition" of offering hospitality to men and women from Commonwealth and colonial territories who enjoy the right of unrestricted entry to the mother country.

Law Relating to Abortion

IN 1938, at the Central Criminal Court, an indictment was preferred against an obstetrical surgeon alleging that he had used an instrument with intent to procure the miscarriage of a certain girl, contrary to the provisions of s. 58 of the Offences against the Person Act, 1861. It appeared that in this case, *R.* v. *Bourne* [1939] 1 K.B. 687, the girl in question, who was fourteen years of age, had been raped by a soldier and as a result had become pregnant. The defendant formed the opinion that the continuance of the pregnancy would probably cause serious injury to the girl, injury so serious in fact as to justify its termination. Another doctor took the view that, if the girl had given birth to the child, she would probably have become a mental wreck. With the consent of the girl's parents and as "an act of charity . . . unquestionably believing that he was doing the right thing," the defendant performed the operation openly in hospital. Macnaghten, J., directed the jury "that the burden rests on the Crown to satisfy you beyond reasonable doubt that the defendant did not procure the miscarriage of the girl in good faith for the purpose only of preserving her life." His lordship added that, if they believed that the defendant was of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy would be to make the girl a physical or mental wreck, they were quite entitled to take the view that the doctor was operating for the purpose of preserving her life. In the event the defendant was acquitted. In a letter to *The Times* (2nd September), the Abortion Law Reform Association restated its contention that the present law relating to abortion, which is based on the Act of 1861 and *R.* v. *Bourne*, bears no relationship to modern medical practice and they call for new legislation "to embody specific grounds on which legal abortion can be recommended and performed by qualified medical practitioners." The Association recalls that in 1939 the Interdepartmental Committee on Abortion recommended the clarification of this aspect of the law, but in December, 1957, Mr. BUTLER told the House of Commons that he could not see the "practical need" for reform. On 3rd April of this year he was asked on what evidence he had arrived at this conclusion and in a written answer he simply stated: "On the decision in the case of *R.* v. *Bourne*."

Child Delinquents: Psychiatrists' View

THE Royal Medico-Psychological Association, whose Child Psychiatry Section is generally regarded as being the representative body of child psychiatrists in this country, has now published the memorandum which it has submitted to the Committee on Children and Young Persons. In cases of children in need of care and protection or beyond control, the Association suggest that the element of emotional neglect is frequently of outstanding importance and that this is often found in children from the many homes which are not only broken in the usual sense but also from those which appear to be adequate yet are really broken, as the parental relationship is one of indifference, or smouldering hostility, and lacks the vital emotional quality upon which true family life depends. Neglect of this character can rarely be satisfactorily relieved by criticism, direct advice or legal action but can best be prevented by the numerous community agencies which seek to preserve family life and arrest the deterioration of relationships in the home. These agencies should be encouraged to co-operate with the child psychiatric services and legal action should be resorted to only when all other methods of approach have failed. The Association are of the opinion that a certain number of older delinquent children appear to be capable of continuing the process of social development only within a controlled environment and they contend that this group is in urgent need of scientific observation and study. They are not the first to recommend the raising of the age of criminal responsibility and they argue that the utmost discretion should be employed in communicating the contents of psychiatric reports to parents or to the children concerned. Undue publicity of cases appearing before juvenile courts which, although the name of the child may be withheld, often leads to notoriety, should be avoided and some of the magistrates on the juvenile panel should come from the younger age group of family men and women. Whenever possible, the remand of the child at home is the procedure which they prefer, but it is the belief of the Association that there is need for an increase in hostel accommodation for disturbed adolescents and that greater facilities for the psychiatric observation and treatment in hospital of certain children from juvenile courts should be made available.

Marxist Methods

WHILE we have never imagined that juvenile delinquency is confined to these shores, those who accept the doctrines of Marx must be a little disturbed to read of widespread hooliganism, drunkenness and theft in Moscow and other large Russian towns. Gangs of young people, armed with razors, knives, steel wires, and even revolvers, are said to roam the streets. How do the Russians approach this problem? They employ day and night patrols of members of the Communist Youth League, armed with nothing more than their bare fists, to break up and correct the behaviour of these gangs of their less public-spirited comrades. We would not be surprised to find that there are some in these islands, not necessarily fellow-travellers, who are sympathetic towards the adoption of such methods to combat a certain type of offender and offence, but with all its failings, whatever they may be, the British approach to the young criminal would seem to us to be preferable.

Old Punishment for a New Crime

UNTIL very recently we laboured under the misapprehension that the ducking stool passed out of use many years ago. We are now aware of our mistake and we were interested—dare we say encouraged?—to see that its use has been revived to deal with an age-old offence which, apparently, has recently come within the province of the criminal law. Hitherto the person afflicted was left to work out his own salvation without recourse to the courts. At Leominster, where the ducking stool was last used in 1808, a special court, presided over by the Mayor, convicted a woman on a charge of "consistently and continuously browbeating her husband." The punishment, appropriately enough, was ducking three times in the traditional manner. However, magistrates need harbour no fear of being overwhelmed by a flood of prosecutions. This "trial" formed part of Leominster's shopping week celebrations arranged by the local Chamber of Commerce and the guilty "wife" was none other than the Chamber's president, the owner of the town's fish and chip shop!

LEGITIMATION AND ADOPTION

BOTH legitimation by subsequent marriage and adoption have a lengthy history going back to the early days of the Roman Empire. But despite this long pedigree English domestic law was slow to incorporate either concept, and it was not until 1926 that Parliament introduced legislation to attain this purpose. The Legitimacy Act, 1926, and the Adoption of Children Act of the same year recognised a change in public opinion, which had become less inclined to visit the sins of parents upon their children. Both statutes are designed to help the illegitimate child by securing his position in relation either to his natural parents or to his adoptive parents.

Legitimation by subsequent marriage

Section 1 (1) of the Legitimacy Act, 1926, which introduced legitimation by subsequent marriage into English law, provides that "Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens." Subsection (2) of the same section provides that "Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born."

Generally speaking, a child who has been legitimated under this section is in the same position so far as his personal status is concerned as a child legitimate by birth. In particular, the rights of his parents in relation to his custody and upbringing (including education) are indistinguishable from those possessed by ordinary parents. In effect, this means that from the moment of legitimation (this is normally when the parents marry) the frail legal ties which formerly existed between the child and its natural father are replaced by the far stronger ties which exist between a father and his legitimate child. Thus, for example, the natural father gains a right to the child's custody which he did not previously possess (see *Re M (An Infant)* [1955] 2 Q.B. 479, at p. 488) and, furthermore, the machinery for enforcing this newly-acquired right becomes available to him. He can, for example, apply for custody of the child under the Guardianship of Infants Acts, 1886 and 1925, which he could not do before the legitimation: see *Re C.T. (An Infant)* [1957] 1 Ch. 48. Correspondingly, of course, the position of the child's mother is weakened.

Legitimation of adopted children

If an illegitimate child is adopted prior to the marriage of its parents what effect will such marriage have upon its legal status? Assuming all the necessary conditions are satisfied, the marriage will operate to legitimate the child, but neither parent will thereby acquire any rights in relation to its future custody and upbringing. The mother's rights in relation to these matters were extinguished and transferred to the adopters on the making of the adoption order (see s. 10 (1) of the Adoption Act, 1950). The father never possessed these rights and it could hardly be argued that the child's subsequent legitimation in some way gives him a say in these matters at the expense of the adoptive parents. But here we come to the crux of the problem which is the main concern of this article. What if the child has been adopted on the sole application of its mother prior to her marriage to the father? Is the adoption order a clog on the father's expectancy under the Legitimacy Act, 1926, or does he acquire normal parental rights when he marries the child's mother? It is submitted that there is nothing in either of the two statutes which we are here considering to warrant any differentiation between a case in which the adoption order has been made in favour of a third party and one in which it has been made in favour of the mother. If the father attains no parental rights on legitimation in the former case the position is surely the same in the latter case. Hence, as the law stands to-day, if the father desires to obtain any rights to the custody of the child and to control its upbringing he should be advised to re-adopt the child jointly with the mother after his marriage to her.

The report of the Hurst Committee

So much for the law as it stands to-day, but what of the future? The report of the Departmental Committee on the Adoption of Children under the chairmanship of Sir Gerald Hurst deals with this problem in para. 247. The committee reject the view that in every case where a mother, having adopted her illegitimate child, subsequently marries the father, thereby legitimating the child, the adoption order should automatically be revoked and that the child should henceforth be in the same position as any other legitimated child. It does so on the ground that an automatic provision of this kind could lead to unfair differentiation between two children adopted by the same mother. The second child might be legitimated under the 1926 Act whereas the first might not, the mother having been married to some third person when it, but not the second child, was born. The committee therefore recommend that to meet this problem the law should be amended to allow an application to be made to the court for the adoption order to be discharged and that the court should deal with each case on its own merits.

The Children Act, 1958

The Children Act, 1958, which is due to come into operation on 1st April, 1959, deals with this problem in s. 27. Subsection (1) of this section, adopting the recommendation of the Hurst Committee, provides that "Where any person adopted by his father or mother alone has subsequently become a legitimated person on the marriage of his father and mother (whether before or after the commencement of this Act), the court by which the adoption order was made may, on the application of any of the parties concerned, revoke that order." Thus, if a court exercises its discretion under this provision, the adoption order will cease to fetter the operation of the Legitimacy Act with the result that the child will be in the same position in relation to both of its parents as any other legitimated child and, in particular, the legal bonds between the child and its father (assuming, as is usually the case, it has been adopted by the mother) will be considerably strengthened. It will no longer be necessary for the child to be re-adopted on a joint application by its mother and father. This simplification in the law is obviously one which will be welcomed by all who are interested in child welfare.

D. L. B.

Mr. David Cadwallader Brian, solicitor, of Plymouth, was married on 30th August at Plymouth to Miss Diana Mary Ching.

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CONTEMPT OF COURT

THERE are several aspects of the present concern about the law governing contempt of court which may interest the practising solicitor. If, like most lawyers, he is conservative in habit but anxious to reform the law where he sees a manifest injustice, he will approve the resolution of the Bar Council which called for an examination of the question of the right of appeal in cases of criminal contempt. If he believes in preserving the liberty of the Press, he will probably favour the conduct of a professional body, representing a large number of journalists, which has called upon the Lord Chancellor to set in motion the means of clarifying the present law and of setting up the right of appeal. If he is himself engaged at any time in litigation on behalf of a client either in the civil or the criminal courts he would do well to take note of the law as it stands now—for neglect to appreciate the present position might indeed be dangerous.

Contempt in the face of the court

The High Court has always claimed to exercise jurisdiction over acts constituting a contempt of court. The more serious kind is criminal as distinct from civil contempt (which generally consists of disobeying an order of the court, e.g., injunction). There are several types of criminal contempt, the most obvious being, as the phrase is, contempt in the face of the court. Such a case arises where a person insults a judge to his face, or threatens him or assaults him while he is in the course of conducting judicial proceedings. It is contempt because it obstructs or tends to obstruct the due administration of justice; because it is so blatant it may be punished at once and the offender is committed *instanter*. The punishment is imprisonment for an indefinite time or a fine of unlimited amount. This power to punish for contempt is not confined to proceedings in open court; it may be exercised where the proceedings are in chambers. It is not confined to parties or witnesses. It may be committed against a solicitor if the contempt is committed against him while discharging his duties, for a solicitor is an officer of the court and the court will protect him. It has been held, for example, that a solicitor who assaults and intimidates the opposing solicitor in passing from the judge's chambers to the outer door of the court may be punished by committal; but an assault committed by one solicitor on another in the office of the former, upon an inspection of documents in an action, will probably not amount to a contempt. Solicitors in general, being officers of the court, are subject to special statutory jurisdiction under the Judicature Act, 1925, and s. 50 of the Solicitors Act, 1957; and as a rule are liable to punishment for any kind of contempt.

Comments on proceedings in progress

Contempt in the face of the court is the most obvious but least common type of criminal contempt. What other types of contempt may solicitors find themselves involved in? The most prevalent type to-day is the publication of comments on judicial proceedings while those proceedings are in progress and before they are completed, if those comments obstruct or tend to obstruct the proper and impartial administration of justice. The most obvious case is that of a newspaper publishing inaccurate and sensational comments on some case in its early stages where the effect of such publication might be to prejudice a fair trial. If a solicitor acting in the case were to be so unprofessional as to be a party to such publication there is no doubt that he could be attached and committed for contempt for an unlimited period of punishment and a fine of unlimited amount could be levied. And he would have no right of appeal, for in cases of criminal contempt there is no right of appeal. This comes about because the offence is punishable summarily. There is only a right of appeal to the Court of Criminal Appeal under the Criminal Appeal Act, 1907, which created that court. And an appeal will only lie where a person has been convicted on indictment. So in this case he could have no appeal to the Court of Criminal Appeal.

But surely, you will say, in that case there will be an appeal to the Court of Appeal? The answer is that under the Judicature Act, 1925, the Court of Appeal cannot hear appeals in any criminal cause or matter. So either way there is no appeal. Your solicitor contemner is without remedy. A rather glaring example has been given, picturing the solicitor as taking part in the publication of matter injurious to a fair trial or the impartial administration of justice. But there are less glaring circumstances in which he might find himself liable. Consider what happened in *Scott* v. *Scott* [1913] A.C. 417. In a nullity suit an order was made for hearing of the cause *in camera*. The wife petitioner obtained copies of the transcript of the medical examination of the husband and with the aid of her solicitor sent them to various members of the family in order to maintain her reputation. It was held on the facts that the conduct of the petitioner did not amount to criminal contempt, but the House of Lords, as well as the Court of Appeal, reviewed the conduct of the solicitor as well and it is obvious from their remarks that the duty of the solicitor in such a case was regarded by the court as being no different from that of the wife petitioner. The case is a very useful guide as to how a solicitor should regard himself as an officer of the court.

Reports of proceedings in chambers

A much more recent case is that of *Alliance Perpetual Building Society* v. *Belrum Investments, Ltd., and Others* [1957] 1 W.L.R. 720, tried before Harman, J., last year. In it a stranger to certain proceedings in chambers begun by an originating summons was fined £100 for contempt in publishing an extremely inaccurate report of those proceedings in a national newspaper. The motion to commit was moved by a defendant in the action in chambers so inaccurately reported. The importance of the case was in the fact that the High Court regards proceedings in the privacy of chambers as being subject to the ban on reporting if the report tends to interfere with the due administration of justice, although Harman, J., did point out that the report could not influence the judge who was to try the case ultimately. What he did point out, which is of great importance to solicitors in practice, is that "documents in a pending action must not be disclosed to strangers to the suit," and later that a person is entitled to complain of the unwarranted intrusion of a stranger into his affairs.

These points should be borne well in mind by practising solicitors, for, being officers of the court, their conduct is bound to invite strict scrutiny and any careless or thoughtless disclosure of information to the Press of matters in a pending suit may possibly give rise to proceedings for contempt, not only against the solicitor but also against the Press so informed. And no solicitor wants to be the vehicle (albeit the unintended vehicle) of trouble of that sort.

Imprisonment for contempt

One final word is of interest. Persons committed for contempt, whether for an indefinite or a fixed period, are treated under special prison rules. Male prisoners are detained at Brixton and females at Holloway and out of London in certain local prisons. They are not compelled to wear prison dress nor are they put in association with criminal prisoners. But there is one exception—a person committed for contempt by acting as a solicitor although not duly qualified is an ordinary criminal prisoner. He has no privileges similar to those enjoyed by other contemners. But contemners, in general, are not allowed to languish "in durance vile" indefinitely: the Lord Chancellor receives a report four times a year from the Official Solicitor upon their well-being after each quarterly visit which it is his duty to make. The Lord Chancellor receives a report from each gaoler who receives at his prison any person committed for contempt. And the Lord Chancellor may direct the Official Solicitor to take such steps on behalf of each or any person so committed as may be required. They may be contemners in law, but not outcasts.

W. H. E. J.

THE MAINTENANCE ORDERS ACT, 1958

THIS Act received the Royal Assent on 7th July, 1958, and will come into operation on a date to be fixed. The introduction of the Bill was noted at p. 78, *ante*, but the Act has made additional changes in regard to magistrates' powers of imprisonment for arrears under maintenance, affiliation and contribution orders.

The Act will authorise the enforcement in magistrates' courts of wife-maintenance and child-maintenance orders made by the High Court and county courts and the attachment of wages and pensions by any court to satisfy such orders, whether made in the High Court or county court or by magistrates. It reduces the periods of imprisonment which a magistrates' court may impose for arrears under such an order (whether made by magistrates or a superior court) and provides that such imprisonment shall not wipe out the arrears. It also allows wife-maintenance and child-maintenance orders made by magistrates to be enforced in the High Court, and a new provision enables persons about to be imprisoned or actually imprisoned by magistrates under such orders to apply to postpone, or be released from, the imprisonment.

Registration of orders

Part I of the Act, following a recommendation of the Royal Commission on Marriage and Divorce, will allow a maintenance order made by the High Court or a county court in favour of a wife or children under the Matrimonial Causes Act, 1950, or the Guardianship of Infants Acts, 1886 and 1925, to be registered in the magistrates' court for the area in which the man liable to pay is. The person entitled to receive the payments under the order makes the application to the court which made the order; the Act does not indicate whether notice of the making of the application must be given to the person liable to pay nor whether he may oppose it. The Act, in fact, is so worded as to allow such an application to be made *ex parte*, but no doubt Rules of Court will clarify this point. The making of such an application means that any pending proceedings for the enforcement of the order in the High Court or county court must be suspended, so that, once registration is effected and remains uncancelled, the magistrates' court alone has power to enforce payment under the registered order. Registration can, it seems, be sought as soon as the order for maintenance is pronounced, and its advantages are the speedier, cheaper and possibly less complicated methods available before magistrates. Not only arrears of maintenance but also payment of costs may be enforced in this way. Whether to apply for registration of a maintenance order made by the Divorce Court is a matter for consideration in each particular case. Some magistrates, it may be thought, adopt a robuster attitude towards maintenance defaulters than some judges do when it comes to making committal orders. On the other hand, magistrates have no power to order garnishee or receivership proceedings, and levying execution on chattels will be in the hands of much more experienced persons when done by the sheriff's officer than when done by the police. As will be seen, all courts may order attachment of wages or pension, and a committal order may not generally be made by a magistrates' court where attachment is available.

By s. 4 of the Act, an order of the High Court or county court registered in a magistrates' court may be varied by the latter in respect of the rate of payments but not so as to exceed the rate of payments as last ordered by the superior court or the rate of £5 per week for a wife (or ex-wife) and 30s. per week for a child, whichever is the greater. Thus, if the Divorce Court orders a man to pay to his wife £12 per week and £3 per week for his child and the order is registered in a magistrates' court, the latter court may vary the weekly rates to any figure not exceeding £12 for her and £3 for the child. If the Divorce Court had ordered £4 10s. per week for her and 25s. per week for the child, the magistrates could not vary the weekly rates to figures above £5 and 30s. respectively; they may, however, if appropriate, remit to the Divorce Court an application to increase the rates to figures above the maxima mentioned above. Other variations and applications to discharge presumably continue to be dealt with by the superior court.

Part I of the new Act also allows orders made by a magistrates' court for maintenance of a wife or child (including affiliation and contribution orders) to be registered in the High Court, provided that an amount equal to four or more weekly payments is due and unpaid and existing proceedings for its enforcement before the magistrates are terminated. The advantage of registering in the High Court are that proceedings by way of appointment of a receiver, charging order, garnishee and execution will then be available against a wealthy defendant, but it is probable that such occasions will be rare. Variation and discharge of a magistrates' order so registered is effected by the magistrates and not by the High Court, but no enforcement proceedings may be taken by the magistrates during the period of registration. As, by s. 3, a registered order is enforceable in all respects as if it had been made by the court of registration, it may be that this provision is wide enough to enable an affiliation order or contribution order registered in the High Court to be enforced in France or Belgium or throughout most countries of the British Commonwealth under the Administration of Justice Act, 1920, or the Foreign Judgments (Reciprocal Enforcement) Act, 1933. Orders under the Summary Jurisdiction (Separation and Maintenance) Acts and the Guardianship of Infants Acts may anyhow be enforced throughout most parts

of the Commonwealth under the Maintenance Orders (Facilities for Enforcement) Act, 1920, although the new Act may be of use for enforcement of such orders when the husband has gone to France or Belgium.

Section 5 of the 1958 Act provides for cancellation of registrations under Part I.

Attachment of earnings

Part II of the Act applies to all courts by which payment of arrears under a wife-maintenance or child-maintenance order (including affiliation and contribution orders) is being enforced. If an amount equal to four or more weekly payments (or if payment is not made weekly, two payments) is in arrear and the defendant is a person to whom earnings fall to be paid, the court may order his employer to deduct payments from his earnings to cover the weekly order and a gradual payment off arrears and unpaid costs. An attachment of earnings order may not be made if the defendant's failure to pay was not due to his wilful refusal or culpable neglect (s. 6 (2)) and, as stated, it cannot anyhow be made until the stated amount is in arrear. The attachment order specifies both the normal deduction rate and the protected earnings rate; the former is such sum as is necessary both to meet the weekly (or other) payment under the order and also to work off the arrears at a reasonable rate. Thus, if a wife has a maintenance order of £3 per week against her ex-husband and he is £15 in arrear, the magistrates may feel that the arrears should be paid at £1 per week; the attachment order will therefore be the weekly order of £3 plus £1 per week off the arrears, a total of £4 per week. The protected earnings rate is the rate below which, having regard to the resources and needs of the defendant and the needs of persons for whom he must or reasonably may provide, the court thinks it reasonable that his earnings should not be reduced. Thus, if the ex-husband in the above example had married again, the court might direct that the earnings paid to him for his own use should not fall below £7 10s. per week. Seemingly, if his wages were £15 per week when the attachment order was made but later drop to £9 per week, the employer will then pay over only 30s. per week and, if they drop further still to £7 10s. per week or less, nothing at all will be paid unless and until the protected earnings rate is varied, e.g., because the second wife has herself got a job. Under the Schedule to the Act, however, the employer must make up, if the man's wages later increase, under-payments for previous weeks (being weeks during which the attachment was current), after paying to the man such sums as are necessary to make up to the protected earnings rate under-payments to that man during previous weeks. Thus assuming an attachment order of £3 10s. per week and a protected earnings rate of £7 10s. and the man's wages to have been in successive weeks £8, £7, and £20, the employer will have paid to the court in the first week 10s. only and in the second week nothing. On the third pay-day there are thus arrears of £6 10s. plus what is due on that day. Before making up out of the third week's payment these arrears, the employer must pay to the man a further 10s., to bring his pay for the second week up to £7 10s. Only then may the employer dispose of the balance of £12 in payment of the two previous weeks' arrears and the sum due for the third week.

Section 9 allows the court which made the attachment order to vary or discharge it, and the order ceases to have effect where registration under Part I, *supra*, is granted, where a committal order is made or where the order is discharged or is registered in Scotland or Northern Ireland. The court is required itself to proceed to vary it, after notice to the parties, where the defendant starts over-paying. See *infra* as to cases where the wife goes abroad. Section 10 indicates the duties of the employer on receiving an attachment order in respect of an employee. Section 11 empowers the court to order the defendant to give particulars of his earnings and the name and address of his employer and to require the latter to give a statement of earnings; such a statement may be received in evidence. The court should automatically see to variation of the weekly attachment figure when the arrears have been paid; the figure should then be reduced to the amount of the weekly order.

By s. 14 earnings paid by the Crown, including pensions in H.M. Forces, may be attached and s. 21 defines "earnings" as wages or salary (including bonus, commission and overtime pay) and pension (including periodical payments by way of compensation for loss, or diminution in the emoluments, of any office or employment). Sums payable by a government outside Great Britain or Northern Ireland, as pay in H.M. Forces, as National Insurance benefit or pension, as a disability pension or as wages to a seaman or apprentice (as defined by the Merchant Shipping Act, 1894) otherwise than on a fishing boat, are not attachable.

By s. 15 fines are prescribed for failure to comply with orders made under Part II. It will be a defence for an employer to prove that he took all reasonable steps to comply with an attachment order. The higher fine for a second or subsequent offence by an employer of failing to comply with an attachment order applies only where the later offence is in respect of the same attachment order.

A complaint for an attachment order in a magistrates' court is not subject to the six months' limitation period normally applicable to summary proceedings (s. 20 (7)). Any court hearing proceedings for committal of a man for arrears under a wife- or child-maintenance order may make an attachment order and, as will be seen, magistrates generally must do so, if appropriate. The making of an attachment order will not, it seems, restrict the power of the High Court or county court to make a committal order also, e.g., if the man has other sources of income, but magistrates are more restricted (see *infra*).

It can perhaps with advantage be repeated that an attachment order may not be made unless and until the relevant amount stated above is in arrear (this may include costs), whatever dark threats the man may have uttered about refusing to pay. Also, the procedure applies only to orders for maintenance of a wife or ex-wife and children (including affiliation and contribution orders), and an undertaking was given in the House of Commons that the procedure would not be extended to other debts or fines.

Committal orders in magistrates' courts

Part III of the new Act substitutes some new provisions for subss. (3) to (7) of s. 74 of the Magistrates' Courts Act, 1952, which deals with committal orders made by magistrates for non-payment under wife- and child-maintenance orders. The principal changes are that the maximum imprisonment awardable for refusal to pay under such orders (including affiliation and contribution orders) will be six weeks instead of three months or the lesser period laid down by para. 1 of Sched. III to the Magistrates' Courts Act, 1952. Imprisonment will no longer operate to discharge the defendant from his liability to pay the sum in respect of which he was committed but, by s. 17 of the 1958 Act, he may not be committed again for that sum. Before making a committal order, the court must, as now, be satisfied, by enquiry in the defendant's

presence, that his failure to pay was due to his wilful refusal or culpable neglect. The committal order must be made in his presence, but the court may hear other parts of the proceedings in his absence, provided, of course, the enquiry was made in his presence. A further change is that, where the magistrates have power to order attachment of wages, they may not make a committal order unless of opinion that it is inappropriate to make an attachment order. Inappropriateness could properly be found where it was known that the defendant had immediately left previous jobs on attachment being ordered or where his private income was nearly or quite sufficient to meet the order without touching his earnings. But it is possible to think of instances where this restriction may cause difficulty.

Postponement of and release from imprisonment

Section 18, which relates only to committal orders made by magistrates, makes new law. Magistrates have power to suspend a committal order for arrears under a wife- or child-maintenance order while the defendant pays the weekly sum due under that order plus a specified sum off the arrears; this power is frequently exercised. At present, if he falls behind with his payments, he can be arrested and taken to prison even though he may have lost his job since the committal order was made and in fact have been quite unable to comply with the conditions of the suspended committal order. When s. 18 is in operation, the magistrates' clerk must give notice by registered post to a person who has fallen behind with payments under a suspended committal order, stating that, if the man considers that there are grounds for not issuing the warrant, he may apply to the court accordingly. Some days—the precise number will be prescribed by Rules—must then be allowed to elapse to see if he will make such an application. If he makes none during this period, the warrant is issued in the normal way. If he does apply, however, a magistrate considers the statements contained in his application and, if the magistrate thinks that the matter requires consideration, he refers it to the court. If the magistrate thinks that it does not require further consideration, he issues the warrant forthwith. If the former course (reference to the court) is taken, notice is given to both parties and there will be a public hearing. The court may proceed in the absence of either party. At the hearing, the court may issue the warrant or further postpone its issue until such time and on such conditions as it thinks just or even direct that the warrant shall never issue; at the hearing all or some of the arrears may be remitted.

Where a man is actually in prison under a magistrates' committal order for wife- or child-maintenance arrears, he may apply to a magistrate of the committing court for his release. The magistrate may refuse his application or refer it to the court. If the latter course is taken, notice of the date of hearing is given to the wife or other payee and to the prison governor. *Semble*, the latter will see to the defendant's production. At the hearing, the application for release may be refused or granted; in the latter case the court may, if it thinks fit, fix a term of imprisonment in respect of the sum still outstanding, less an allowance for the time already served (e.g., if he has served half the term originally fixed, the new commitment will be in respect of only half the original arrears, unless, with consent, other outstanding arrears are brought in), and postpone the issue of the warrant until such time and on such conditions as it thinks just. On this application also the court may remit all or any of the outstanding arrears and proceed in the absence of the parties. A notice given by a magistrates' clerk will be deemed to be given if sent by registered post addressed to the person at his last known address, notwithstanding that it is returned as undelivered or for any other reason not received (s. 18 (8), enacted, no doubt, to avoid the difficulties raised by *Beer* v. *Davies* [1958] 2 W.L.R. 920; *ante*, p. 383).

Parties abroad

A new provision is found in s. 20 (3). Normally, where a party to civil proceedings before magistrates is in Eire, the Channel Islands or beyond the seas, he cannot be served with a summons (unless perhaps he obligingly instructs a solicitor here to accept service for him) and so the proceedings cannot go on. This means, of course, that a man paying maintenance to his wife at £5 per week can do nothing about reducing or discharging the order if she goes to live abroad, even though he falls ill and cannot work or she commits adultery. In such cases the court can be asked to use its discretion not to enforce the order, even though in law it continues in operation. An order attaching earnings, however, must obviously be discharged or varied in such circumstances, as the employer has no discretion about not paying under it. Provision is therefore made by s. 20 (3) of the 1958 Act for giving notice to the payee abroad of proceedings to vary or discharge the attachment order (but no other magistrates' order); on proof that she has been given the notice by the steps to be prescribed by Rules, the English magistrates' court may, if it thinks it reasonable in all the circumstances to do so, then vary or discharge the attachment order.

The new Act is going to give rise to many mathematical problems in calculating amounts of wages, deductions and tax and in distinguishing between arrears which may and those which may not be the subject of a committal or further committal. However, if the experience of Scotland is a reliable guide, the attachment of earnings will mean that many wives will now regularly receive money which previously they did not receive or received only after great trouble, and also that many men who would otherwise go to prison will escape it.

G. S. W.

DEVELOPMENT PLAN

North Riding of Yorkshire County Development Plan

On 12th August, 1958, the Minister of Housing and Local Government amended the above development plan by adding thereto Street Authorisation Map No. 2 for the Borough of Thornaby-on-Tees. A certified copy of the plan as amended has been deposited at County Hall, Northallerton, and a certified extract thereof has also been deposited at the Town Hall, Thornaby-on-Tees. The copy and extract of the plan so deposited will be open for inspection, free of charge, by all persons interested between the hours of 9 a.m. and 5 p.m. on Mondays to Fridays inclusive, and 9 a.m. and 12 noon on Saturdays. The amendment became operative as from 26th August, 1958, but if any person aggrieved by it desires to question the validity thereof or of any provision contained therein on the ground that it is not within the powers of the Town and Country Planning Act, 1947, or on the ground that any requirement of the Act or any regulation made thereunder has not been complied with in relation to the making of the amendment, he may, within six weeks from 26th August, 1958, make application to the High Court.

Common Law Commentary

PROMISES EXTERNAL TO THE CONTRACT

THE decision in *City and Westminster Properties* (1934), *Ltd.* v. *Mudd* [1958] 3 W.L.R. 312 ; *ante*, p. 582, is very valuable in that it covers circumstances that are by no means uncommon and gives a useful ruling. At the same time it brings out the distinction between *Central London Property Trust* v. *High Trees House, Ltd.* [1947] K.B. 130 and *Re William Porter & Co., Ltd.* [1937] 2 All E.R. 361.

In substance the case is one where the terms of a bargain as presented in a formal document are not quite to the liking of the party to whom they are presented, and, after protest, he is told that if he will sign, he will nevertheless be allowed the concession he wants although that concession is not contained in the document, but on the contrary is one which purports to cover an act which is in breach of the terms of the document. Is he bound by the written terms of the document openly signed with full knowledge of its unsatisfactory provisions, or is the other party estopped by the promise of the concession? The answer, as given by Harman, J., in the above case is that if the promisee acts on the promised concession the promisor is bound notwithstanding the written terms of the document.

The case concerned the grant of a lease of a shop and the trouble giving rise to the action concerned the right of the tenant to sleep on the premises. The landlord and tenant aspect of the case is dealt with at p. 611, *ante*. The tenant first took a lease of the premises in 1941 when he was allowed (by the landlords) to sleep in an office behind the shop, and considering the circumstances of 1941 that was a perfectly understandable request, and was granted partly because it was useful to have someone on the premises in case of incendiary bombs falling on them. The lease was for three years and was renewed for another three years in 1944, but the lease contained a covenant not to use the premises except as a shop for the tenant's business as an antique dealer and not to do anything whereby it might be assessed as a dwelling-house. Notwithstanding that provision the tenant not only continued to sleep on the premises but in fact fitted it up as a residence. The plaintiffs apparently did not know of this conversion into a residence at that time but knew of the tenant's continuing to sleep there. At the end of that three years, in 1947, when a further lease was negotiated, the landlords had clearly changed their minds about his sleeping on the premises, for not only did they repeat the covenant as to user solely for showrooms, workrooms and offices but added " and not to permit or suffer the demised premises or any part thereof to be used as a place for lodging, dwelling or sleeping."

The defendant's solicitors struck the quoted words out of the draft, although of course there was still left a covenant which virtually negatived residential or sleeping use. One objection was that unless he slept on the premises he could not obtain burglary insurance for his valuable stock, whilst the plaintiffs feared the application of the Rent Acts. In that form the document was eventually executed, but only after the plaintiffs' agent had promised the defendant that if he signed the lease the plaintiffs would make no objection to his continuing to reside there. That was a fourteen-year lease, and, towards the end of it, when the question of renewal came up, the plaintiffs' managing director visited the premises, and, finding that the defendant was living there, gave him notice to quit, subsequently bringing an action for forfeiture on the ground of breach of covenant.

A good many questions arose on this controversy, though they were not altogether novel. Nevertheless there is a useful judgment arising from this type of situation bringing together the principles to be applied to the various questions that arise. In this article we are merely concerned with the points on the construction of contracts and not with the landlord and tenant aspect dealt with elsewhere.

Extrinsic evidence

The first point was whether, in construing the covenant, it was permissible to look at the past history of the negotiation of the document and particularly to the circumstance that words relating to sleeping and residence had been inserted and then deleted by agreement. The answer was in the negative, and so was the answer to the question whether one could take into consideration the plaintiffs' knowledge of the defendant's having continuously used the premises for sleeping. One can consider surrounding circumstances to help in the construction of the meaning of words, but these facts were not " surrounding circumstances " for that purpose.

That is not necessarily the rule in commercial cases. " In commercial cases where printed forms are used, attention has been paid to words struck out," said his lordship, adding " This method of construction had, I believe, the great authority of Scrutton, L.J. There is an instance of it in *Caffin* v. *Aldridge* [1895] 2 Q.B. 648, 650. That was a commercial cause where the court had to construe the word ' cargo ' and they could see on the face of the document that before the word ' cargo ' there had been the words ' full and complete ' and these had been struck through. Lord Esher, M.R., said this : ' In order to see what it meant, one must look at the rest of the document. We find the words " full and complete " were erased ; and that could only, I think, have been done for the purpose of showing that such was not the intention ' . . . Whether this be legitimate," Harman, J., went on, " I take leave to doubt : for example, in *Inglis* v. *Buttery* (1878), 3 App. Cas. 552, again a commercial case, the House of Lords held that neither the letters of the parties before the contract was signed nor deleted words in the contract could be considered for the purpose of interpreting the intention of the parties . . ." Harman, J., proceeded to quote a statement of Lord Hatherley to the effect that one could not look at words with finely drawn lines through them, and concluded that even if that method of construction was allowable it was confined to commercial cases and to words in the final document which had been struck out. It would not apply to words struck out of a draft.

Waiver

But there was the question whether the plaintiffs had waived their rights under the covenant. Residence contrary to the covenants of a lease is a continuing breach, so that any waiver would operate by the acceptance of rent only to the date of that acceptance. There are cases suggesting that continuous waiver may be sufficient to change the nature of the relationship by introducing a licence in respect of the breach. But Harman, J., did not think that that applied here. The landlords knew the defendant was sleeping on the

premises but not more than that. At that they were willing to wink, but there was not a release of the covenant or an agreement for a new letting. Waiver therefore failed as a defence.

Reliance on promise

Finally there was the question of estoppel. His lordship pointed out that estoppel was a misnomer in the present case, for estoppel, or promissory-estoppel as it is sometimes called, arising out of the controversial case of *Central London Property Trust* v. *High Trees House, Ltd. supra*, is concerned with cases where one party has an existing legal right which he agrees to forgo and the other party acts on that agreement, whereupon the first party is bound notwithstanding that there is no consideration. But in this case the position was different, for any promise on which the defendant acted was made, not after the lease, but before it was executed. There was a bargain beforehand that if the defendant would execute the lease the plaintiffs would not enforce the covenant against him personally concerning the use of the shop for sleeping, and in reliance on that promise he executed the lease. The defendant said that but for that promise he would not have executed the lease but would have moved to other premises available to him at the time. That created a contract on the authority of *Re William Porter & Co., Ltd., supra*, in which there is a clear statement of principle drawn from the House of Lords case of *Cairncross* v. *Lorimer* (1860), 3 L.T. 130. The plea that this was a mere licence retractable at will by the landlords was therefore rejected. Consequently the defence succeeded and the action was dismissed.

Deletions during negotiations

To some, the most interesting of the points arising from this case will be the remarks concerning the negotiations in relation to a document which manifest themselves so often in crossings out in colour after colour. The refusal of the court to accept this and the doubts which were expressed even at looking at crossings-out of a printed form seem a little too narrow. Why should they not be taken into account as material in all cases ? The court need not be bound to give effect to every one as though it were conclusive of any inference which could possibly be drawn from the alteration.

L. W. M.

TAX SAVING—" SHELL " COMPANIES

A " SHELL " company is one which has lost or disposed of its trading assets, but whose shares are quoted on a recognised stock exchange. Such a company may or may not have cash assets.

In some circumstances, the acquisition of not less than 75 per cent. of the shares of a shell company by the owners of a private company, and the subsequent purchase of the private company by the shell company, can prove of great benefit from the taxation standpoint, particularly since the withdrawal of the " Chancellor's umbrella " against sur-tax directions on 1st August, 1957. Hence the present popularity of the " shell operation."

Sur-tax companies

If a company to which s. 245 of the Income Tax Act, 1952, applies has not within a reasonable time after the end of its accounting period distributed a reasonable part of its income in dividends, the Special Commissioners may direct that the *whole* of the company's income for that year, as computed for taxation purposes, shall be treated as income of the members and apportioned among them according to their respective interests in the company. In such event the apportioned income will attract liability to sur-tax as if it formed the highest slice of the members' incomes.

The type of company concerned is one which is (i) under the control of not more than five persons (within the extended meaning of the term " person ") ; (ii) not a subsidiary company, and (iii) not a company in which the public hold shares carrying 25 per cent. or more of the voting power, and such shares have been officially quoted and dealt in on a stock exchange during the year.

" Chancellor's umbrella "

In the early post-war years it was part of the Government's anti-inflation policy to freeze dividends. Accordingly, in July, 1948, the then Chancellor, Sir Stafford Cripps, stated in the House of Commons that no sur-tax directions would be made against trading (or property investment) companies which maintained the same dividends as those paid for the last accounting period prior to 30th June, 1947, even if profits had since risen ; and if for special reasons no distribution was made for any period prior to June, 1947, and no sur-tax direction had been made in respect of such period, then the continuance of this policy would not be challenged by the Inland Revenue. Later, Mr. Macmillan extended a similar concession to companies which first started to trade since June, 1947.

These extra-statutory concessions were withdrawn on 1st August, 1957, in respect of accounting periods ending after that date, so that all companies within the scope of s. 245 of the Act of 1952 are once more fully exposed to the risk of sur-tax directions if they fail to pay a reasonable dividend, having regard to the statutory tests of adequacy prescribed by s. 246. What is reasonable in a particular case will depend on circumstances : in the case of a manufacturing company, for example, replacements of plant, machinery and other equipment will justify a greater profit retention than in the case of a retail company.

Reasonable distribution

By and large, however, a distribution of 30 per cent. of profits will now be required, and if less than this rate was paid during the concessionary period, a review of dividend policy will be necessary. But in the case of a one-man or family company, the distribution of even 30 per cent. of profits may result in a heavy charge to sur-tax. Moreover, under the protection of the " Chancellor's umbrella " many " controlled " companies were able to accumulate a large fund of undistributed profits, thereby saving both sur-tax and distributed profits tax which, from 1st April, 1956, to 31st March, 1958, was ten times as high as the rate of profits tax on undistributed profits. The substitution of single-rate profits tax for the two-tier system has partly diminished the incentive to retain rather than distribute profits, but if accumulated reserves are distributed as dividends, the greater part, in the hands of the shareholders, will still be absorbed by income tax and sur-tax. As will be seen, this is where the shell company comes in and it can provide the solution to more problems than one of the family company.

Sur-tax clearances

The first step is for the directors of the private company to obtain sur-tax clearances under s. 252 of the Income Tax Act, 1952, in respect of that company for the past six years. If such company has enjoyed the Chancellor's protection during the whole of that period, no difficulty will normally arise ; but if the protection has been lost because the company has had recourse to an avoidance device, such as the extraction of income from the company in the form of capital, then agreement should be reached with the Inland Revenue regarding a reasonable dividend or additional dividend for the period in question, bearing in mind that the protection once lost could not be regained. Once obtained, however, sur-tax clearances preclude the possibility of sur-tax directions being made in respect of those years, and remove a possible obstacle to the sale of the company's shares.

The " shell operation "

The owners of the private company should then find a shell company with an objects clause in its memorandum of association wide enough to cover the business carried on by the private company. Often, shells are found among rubber plantation and mining companies which have disposed of their trading assets, as well as among moribund and unprofitable companies. Not less than 75 per cent. of the shares of the shell company should then be acquired by the owners of the private company, but not by the company itself because of s. 27 of the Companies Act, 1948.

It will be possible to purchase some shares in the market in the ordinary way, but for the remainder a bid will have to be made. If 90 per cent. of the shares is acquired, the remaining 10 per cent. can be purchased compulsorily, and the 25 per cent. which have to be held by the public can be disposed of at a profit when it becomes known that a shell operation is involved. On the other hand, it is less costly to acquire 75 per cent. (allowing a margin for safety), as a higher price has usually to be paid for the tightly held shares. If the shell has no cash or other assets, it may still cost about £8,500 to acquire (to quote a recent figure) because of the stock exchange quotation which it enjoys. On the other hand, if it has substantial cash assets, so that it is a " cash asset shell," the value of the cash holding will be added to the cost.

The next step

The next step is for the shell company to purchase the shares of the private company for their full market value ; and if the private company has a fund of accumulated, undistributed profits, this will be included in the sale price without any deduction for future tax liability. Almost certainly, the private company will have a far greater " worth " than the shell company. If the shell company has any cash, this can be utilised in part payment for the private company's shares, but the cash assets of the private company cannot be used for this purpose, as s. 54 of the Companies Act, 1948, forbids a company to provide financial assistance towards the purchase of its own shares.

The balance of the purchase consideration—or maybe the whole of the consideration—will be satisfied by the issue to the owners of the private company of unsecured loan stock in the shell company, repayable over a term of years out of the future profits of the shell company (of which the former private company will now be a wholly owned subsidiary). The future profits of the shell company (in effect the future profits of the private company), to the extent of the loan stock created, will thus reach the proprietors of that stock (the former owners of the private company) in the form of capital, which is one of the major objects of the shell operation.

Financial benefits

If the shell company has £10,000 cash, and the private company trading assets worth £160,000 and £150,000 in liquid reserves, the purchase consideration may be £10,000 in cash and £300,000 in, say, 6½ per cent. unsecured loan stock repayable over twelve years at £25,000 per annum. In the hands of the loanholders no tax will be payable on the £300,000 repaid to them out of future trading profits, but tax will, of course, be payable on the interest received and on all dividends paid by the company. Looked at in another light, the £150,000 accumulated reserves will be withdrawn from the private company without deduction of income tax or payment of sur-tax by the proprietors. At the same time there is complete immunity from sur-tax directions so long as 25 per cent. of the shell company (no longer really a shell) is held by the public, and the shares are officially quoted and dealt in on a stock exchange.

To achieve these results, the former owners of the private company will have to forego 25 per cent. of their interest in favour of the public, but they would also have to do this if, as another method of avoiding sur-tax directions, they " placed " 25 per cent. of the private company's shares with the public—which is generally considered a more expensive operation. In either event, however, part of the 25 per cent. of the equity can be held by friends and relatives, provided the shares are held by them unconditionally and the relatives are not relatives within the meaning of s. 256 (3) (*a*) of the Income Tax Act, 1952. (See *Tatem Steamship Navigation Co., Ltd.* v. *Inland Revenue Commissioners* [1941] 2 K.B. 194).

Economic considerations

In the case of a small private company the cost of the shell operation renders it unsuitable ; the private company must first expand.' On the other hand, a fair-sized company may have all its reserves invested in the business and be in urgent need of additional capital for development which can only be obtained from the public. Yet the company may be too small to make a public issue of its own shares by means of a prospectus, or be lacking in a proven profit record. For these or other reasons it may be unable to obtain the consent of the Capital Issues Committee to raise money from the public, or the permission of the Stock Exchange Council to deal in the company's shares. In such event the company will be forced to resort to the expedient of acquiring a shell to convert itself into a public company.

Until recently the shell operation (which in this case did not necessitate a stock exchange quotation) was also employed to avoid the official controls relating to the raising of capital, but this has now been stopped by the Control of Borrowing (Amendment) Order, 1958.

K. B. E.

Mr. George James Campbell, solicitor, of Littlehampton, and his wife have just celebrated their diamond wedding.

Mr. David Godfrey, solicitor, of Leicester, was married on 30th August at Leicester to Miss Elspeth Weir.

Mr. J. V. Lander, Coroner for Shifnal, Shropshire, is to retire this month.

Mr. Robert Wai-Pat, solicitor, of Hong Kong, was married recently at Bracknell to Miss Lucilla Yuk-Ying Butt.

Landlord and Tenant Notebook

FRUSTRATION ?

THE havoc wrought by recent gales must again be making some tenants of destroyed premises wonder why they should pay rent for what no longer exists. At one time, it could be confidently asserted that the doctrine of frustration does not apply to leases and tenancy agreements. The doctrine itself was unexpectedly extended when *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32 reversed *Chandler* v. *Webster* [1904] 1 K.B. 493 (C.A.) and Parliament then found time to enact the Law Reform (Frustration of Contracts) Act, 1943. But a tenant who seeks to rely on the doctrine or the Act soon finds himself up against the awkward proposition that he is not merely the party to a contract but the grantee of an estate in land; and the only answer that can be found to an inquiry whether a lease or tenancy agreement can be frustrated is, despite the modifications, "possibly; but hardly ever."

Authority and dictum

The more recent history of the problem may perhaps be said to have begun with *London and Northern Estates Co.* v. *Schlesinger* [1916] 1 K.B. 20, when a Divisional Court held that an Austrian, prohibited from residing in his Westcliffe-on-Sea flat, which he had taken in March, 1914, by an Aliens Restriction Order made after the outbreak of the First World War, was liable for the Ladyday 1915 rent. The defence sought to establish that the "Coronation Cases" (*Krell* v. *Henry* [1903] 2 K.B. 740 (C.A.) being the leading one) applied; it was held that they did not, because personal residence by the tenant was not "the foundation of the contract." This made it unnecessary to go into the question of the applicability of the doctrine of frustration, and wishfully-thinking tenants have been known to regard the decision as at least recognising that that doctrine might operate on a lease. But in fact Lush, J., concluded his judgment by upholding a "further" answer to the tenant's contention: "It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant . . ."

Next we may take *Whitehall Court, Ltd.* v. *Ettlinger* [1920] 1 K.B. 680. The tenant of a requisitioned flat sought to distinguish *London and Northern Estates Co.* v. *Schlesinger* in that the requisitioning had made it impossible for him to assign or sub-let. On this point, Lord Reading, C.J., cited Lush, J.'s *dictum* with approval: the agreement was not only a contract, but also created an estate by demise for a term of years. So far, the decisions would warrant the answer "never," not "hardly ever"; but it will be found that the statement in the headnote "... the doctrine of the termination of a contract by reason of frustration of the adventure not applying to the case of a contract which created an estate by demise" has been criticised in the House of Lords.

Significant omission ?

The headnote to *Matthey* v. *Curling* [1922] 2 A.C. 180 tells us that the House approved *Whitehall Court, Ltd.* v. *Ettlinger*. In this case, a requisitioned house was destroyed by fire but the tenant was held liable both for rent and for dilapidations. What might be called the first glimmer of hope had been introduced at the Court of Appeal stage by Atkin, L.J. (as he then was): "... I see no logical absurdity in implying a term that it, the lease, shall be determined absolutely on ... those events, which in an ordinary contract work a frustration." The reactions of the law lords were, on the whole, negative; and Lord Buckmaster, who discussed most of the earlier authorities, refrained from expressing any view on *Whitehall Court, Ltd.* v. *Ettlinger*. Lord Atkinson's speech includes the statement: "I think the case of *Whitehall Court* v. *Ettlinger* was rightly decided"; but this statement did not cover the headnote with its sweeping pronouncement on the inapplicability of the doctrine of termination by frustration.

Possibility mooted

And then, a couple of years after the decision in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.*, and the enactment of the Law Reform (Frustration of Contracts) Act, 1943, a good deal of attention was given to the question by two of the law lords concerned in *Cricklewood Property and Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.* [1945] A.C. 221.

The facts were that a building lease of 1936 entitled the lessors to ground rents when they had notified the lessees that building (of shops) might proceed, but that the outbreak of the Second World War and the Defence Regulations had made it impossible and illegal for the building operations to continue. The House of Lords held that the suspension "did not strike at the root of the arrangement"; the basis of the contract was not gone, etc.; so that it was not necessary to decide whether a lease could be terminated by frustration. But while Lord Russell of Killowen and Lord Goddard expressed themselves in favour of what might be called the orthodox view on that point ("I am unable to grasp how the doctrine of frustration can ever apply so as to put an end to a lease": Lord Russell; "In the case of a lease the foundation of the agreement is that the landlord parts with his interest in the demised property for a term of years ... so long as the interest remains in the tenant there is no frustration though particular use may be prevented": Lord Goddard), Lord Porter was more guarded ("exceptional circumstances might arise") and both Lord Simon and Lord Wright were at pains to visualise circumstances which might warrant the application of the doctrine.

Site ceasing to exist

According to Lord Simon: "Where the lease is a simple lease for years at a rent, and the tenant, on condition that rent is paid, is free during the term to use the land as he likes, it is very difficult to imagine an event which could prematurely determine the lease by frustration—though I am not prepared to deny the possibility if, for example, some vast convulsion of nature swallowed up the property altogether, or buried it in the depths of the sea. ... Within the meaning of the document the 'site' might cease to exist. If, however, the lease is expressed to be for the purpose of building, or the like, and if the lessee is bound to the lessor to use the land for such purpose with the result that at the end of the term the lessor would acquire the benefit of the development, I find it less difficult to imagine how frustration might arise. Suppose, for example, that legislation were passed which permanently prohibited private building in the area, etc." The latter hypothetical example appealed to Lord Wright, who was, however, more concerned with demonstrating that the existing authorities did not all go as far as had been supposed, criticising, *inter alia*, the headnote in *Whitehall Court, Ltd.* v. *Ettlinger*.

The examples

It will have been observed that Lord Simon asked us to imagine two very different kinds of tenancies, one leaving the tenant entirely free as to use and the other tying him down very strictly. It would, I think, be safe to say that most tenancies fall somewhere between these extremes, contemplating if not actually providing for a particular use; and modern legislation has made this matter of what was contemplated a very important one, security of tenure often depending upon it. But, as regards recent gale damage, it is doubtful whether, severe and unexpected as it was, it has amounted to a " convulsion of nature." (Incidentally, the burial of property in the depths of the sea might give rise to a claim by a third party, namely the Crown, as owner of the foreshore.) And the possibility of frustration by virtue of restrictive legislation seems virtually limited to cases of building leases, under which the lessor is to acquire the " benefit of development." But I suggest that a case in which use might well be made of the *dicta* would be that of the destruction of a block of flats, though it cannot be denied that whether the " sites " of even the upper flats had " ceased to exist " would be arguable.

R. B.

HERE AND THERE

CORFE'S LAWYERS

CORFE CASTLE, inexpugnable on its tall, steep, conical hill, dominates and commands the one gap in the high ridge of the Purbeck Hills. Southward towards the sea lies that strange isolated region of Dorset, so isolated formerly that with its hinterland it is called the Isle of Purbeck still, ending with the cliffs of St. Aldelm's Head. This fortress, which before it was a ruin must have been more splendidly imposing than Arundel seen across the water meadows of the Arun, or even than Windsor itself, had once, rather unexpectedly for so defiantly warlike a structure, a strong legal tradition. It started with Sir Christopher Hatton, Elizabeth's magnificent and intelligent, but, to the lawyers, highly improbable, Lord Keeper, who attracted her favour by his proficient dancing. The castle had hitherto been Crown property. She sold it to him in 1587 for £4,761 18s. 7½d. During the Armada invasion scare in the following year its defences were strengthened. In acknowledgment of its strategic importance the little town at its foot was granted a charter giving it Cinque Port privileges and the right to return two members to Parliament. The castle passed to Hatton's nephew whose widow, the Lady Elizabeth, married Chief Justice Coke, not for his happiness, and survived him too. Eventually she sold it to Sir John Bankes, who became Charles I's Chief Justice of the Common Pleas. In his hands and those of his wife it was destroyed as a habitable abode and gained a glorious immortality. On the outbreak of the Civil War he was on circuit and at the Salisbury Assizes declared himself unequivocally for the King. Lady Bankes was at Corfe Castle and, though the country round about was in rebel hands, she managed during the first confused and ineffective months of the struggle to maintain its integrity. The first serious attempt by the Roundheads to subdue it was a small affair of a couple of hundred men and two guns, an amateur business which lasted six weeks and failed largely owing to the cowardice of Sir William Erle, the officer in charge. He animated his men with rations of spirits but his critics said he kept sober himself " lest he should become valiant against his will." The Chief Justice saw his home delivered but died in December, 1644. Then in October, 1645, serious professional operations under competent officers were begun against the Castle. This time it was adequately prepared and Lady Bankes again defended it. Thanks to its enormous strength it might have held out indefinitely. It was never stormed. It was only through the treachery of one of the garrison that it eventually fell after a four months' siege. After its fall the place was looted and systematically reduced to ruins.

MARBLE FROM THE TEMPLE

WITHIN the rampart of the Purbeck Hills the ground rises steeply to the higher level of the land round St. Aldelm's Head, and if you climb the hill towards Kingston village and, about half way up, turn aside across a couple of fields you will find the closed-up quarry from which the Purbeck marble for the restoration of the clustered pillars of the Temple Church has been extracted. From hereabouts, though no one now knows exactly where, came the marble for the church when it was first built in the 12th century. From here too came the marble for that highly regrettable " restoration " of 1840 when the confident Victorian architects made a clean sweep of the work that Wren had done there in his day. They unfixed all the post-medieval monuments which they deemed inappropriate and patched the spots where the fastenings had been with bits of new marble, thereby considerably weakening the structure. They left the whole place gloomily oppressive with as much bogus antiquity as they could manage, oppressive carved oak pews and meandering scrolls of texts painted on the vaulting, but, all the same, they could not destroy the atmosphere of the Round dominated by the Purbeck marble effigies of the cross-legged knights. As a small boy Richard Roe used often to wander in, full of romantic historical awe. He even won a school prize for a poem on the knights which opened with the magnificent " stuffed owl " lines:

> " Why from the bier of ages past
> Attempt to lift the pall? "

The headmaster pointed out that in recitation there might be an unseemly misapprehension and " dust " was substituted for " bier." The effigies, which were very badly damaged in the general destruction, will not be repaired in time for the opening of the Round in November. Some of the stone squares for the paving are still lying in a quarry near St. Aldelm's Head.

THE MARBLERS

THE quarry men of the Isle of Purbeck have always been a race apart, an ancient brotherhood long bound together as the Ancient Order of Purbeck Marblers and Stone Cutters, with traditional privileges said to have been granted to them by King Alfred as a reward for volunteer naval services against the Danes. In the time of Charles II they protested against certain encroachments on their rights by marching to London to see the King, who granted them a charter certifying that they were King's men and no man must molest them. In 1698 they drew up elaborate regulations for their trade to combat " the growing evills that have and

doe dayly " attend it, so that " the price and value of the said stone is soe lessoned and beate downe that scarce anything can now be gotten by it." Yet the Order survived and in the rough wind-blown land behind the ancient promontory chapel, where St. Aldhelm had his cell and may have written his Latin poem on the satisfaction of being on land and watching ships in difficulties, you may find small quarries worked by highly skilled craftsmen in groups of a dozen, perhaps more or less. Many of them have other work, some as fishermen. Formerly only sons of Purbeck marblers could be admitted to open a quarry here but of late this custom has been relaxed. Every Shrove Tuesday the members of the Order meet at Corfe for a church service incorporating every possible reference to stone or rock in the Scriptures and the hymn book. After that they transact their business in the tiny town hall adjoining. If a new member is to be admitted, the lighter side of his initiation is to carry a pint of beer, despite opposition, across the road to the little " Fox " Inn opposite. They also kick a football along an ancient right of way which they enjoy, and pay the rent of a pound of peppercorns. When all but one of their members were away at the late war, the sole remaining member preserved the continuity of the customs. The Order's ancient documents are now preserved in safety at a bank but not long ago one of the Wardens used to carry them about with him in their old chest on his lorry hoping that one day he might be stopped by a policeman whom he could confound with Charles II's charter that he was a King's man and must not be molested.

RICHARD ROE.

"THE SOLICITORS' JOURNAL," 11th SEPTEMBER, 1858

ON the 11th September, 1858, THE SOLICITORS' JOURNAL said that the report of the committee on the Bank Act, 1844, " exhibits very striking views of the various ways in which the immense amount of gold imported into Europe in the last seven years has been disposed of and the astonishing increase of foreign trade . . . According to accounts obtained from the Bank of England the amount of gold and silver imported into Europe in the period above mentioned, and remaining there . . . is £80,700,000. It is estimated by the Governor of the Bank that the increase which has taken place in the circulating medium of the United Kingdom is 30 per cent. and that the gold in circulation now amounts to nearly £50,000,000. The course of trade may be collected from the exports of the years referred to, which have increased from £78,076,000 in 1852 to £122,155,000 in 1857. This vast increase having afforded remunerative employment to the increasing population of our manufacturing districts, and the remission of duties upon articles of necessity having been attended by a remarkable improvement in the comforts and consuming power of the people, it is possible that to these causes ought chiefly to be attributed the great increase which is believed to have taken place in the circulating medium of the United Kingdom. It is remarkable that this increase has not led to any increase in the total amount of bank notes in circulation. On the contrary, that amount has gradually diminished since 1844 and still continues to decline. The embarrassments which attended the great commercial crisis of 1847 were relieved as soon as the public became aware that the Bank had received authority from Government to exceed the limits imposed by law in regard to the issue of bank notes, and it was not found necessary by the directors to avail themselves of the permission so given. In the panic of 1857 an issue of £2,000,000 beyond the limit was made to the banking department on the authority of the Government letter. The panic then gradually ceased and the usual course of affairs was resumed."

TALKING "SHOP"

September, 1958.

MATRIMONIAL HOME ON INTESTACY

A DAWNING perception of the youth of the London police force is said to be the first classic sign of age, though doubtless there are other ways of learning that one is not so young as one was. In my own case the rude awakening came when I learnt from that Ministry of Defence handbook, *circa* 1938, that I was too old to be a fighter pilot (which, as it turns out, was a good thing, both nationally and personally). In the law there is no insulation at all from shocks of this kind. In fact practice of the law invites repeated reminders of the march of time and (if you look for them) many intimations of mortality. And sooner or later comes a realisation of sentiment shared with that dear old barrister who, being rebuked for obsolescence, declared that he had forgotten more law than his young friend had ever learned.

Some years ago I was winding up the estate of an elderly solicitor whose will contained rather more than its fair share of nonsense, and on the second or third reading it became clear that, although the will was made in 1943, the whole of the Birkenhead legislation had passed the testator by. I could not but wonder what sort of advice he had been giving to his clients in conveyancing matters over the twenty years from 1926 to 1946 when he died. But I daresay he got along very nicely with the Settled Land Act of 1882, just as I believe some solicitors in Wales, by tacit agreement, wholly ignored the Town and Country Planning Act, 1947, whilst the rest of us were full fathom five in the metaphysics of development charges.

All this leads me to the confession that only at a recent date has Sched. II to the Intestates' Estates Act, 1952, forced itself on my consciousness and conscience. *You* will know that it contains an elaborate code which has been framed to enable the surviving spouse of an intestate to acquire the matrimonial home. Dr. Gilchrist Smith, the learned editor of Emmet on Title, wrote an account of these provisions in an article published at 96 SOL. J. 755–6; and the subject may also be studied in his book Intestacy and Family Provision, at pp. 21–8.

Dr. Gilchrist Smith, in the article cited, expressed the view that, as certain powers of appropriation were already available to personal representatives under s. 41 of the Administration of Estates Act, 1925, it was likely that in practice Sched. II to the 1952 Act would not be used very often. I don't know to what extent this prediction has been verified by the practice of solicitors over the last six years but there is one point about stamp duty which seems to be worth noting. This is that for all practical purposes (*pace* the views of ABC at 94 SOL. J. 397, with which I do not necessarily disagree) the stamp-duty people tend to treat appropriations with consent as sales and to levy stamp duty *ad valorem* accordingly. And, *per contra*, it is usually sufficient to show that the

appropriation was validly made without consent (or, as might be said in the political field, " unilaterally ") to obtain exemption or to reduce the duty on the assent to ten shillings. See the passage in Sergeant's Stamp Duties, 3rd edition, at p. 116, which cites in support of this principle the practice of exempting an assent which gives effect to the *right* of an intestate's surviving spouse to the matrimonial home. (The footnote cites s. 6 and Sched. I to the 1952 Act instead of s. 5 and Sched. II, but no matter.)

Now it does seem perfectly clear that, where Sched. II applies, the spouse can " require " an appropriation (para. 1) which is not normally the case under the Administration of Estates Act. But the correct procedure must be followed and notice given to the personal (or other personal) representatives within twelve months after the grant (para. 3 (1)) or such extended period as the court may allow (para. 3 (3)). For reasons of stamp duty, if none other, it seems desirable that the appropriate notice should be given in due time and thus establish that it is a matter of compulsion and not of bargain and sale. (I am assuming, of course, that the value of the property is such as to attract stamp duty on a sale.) It is thus a matter which should be considered as soon as possible after the death. Time passes rapidly and not only bears all its sons away but many legal remedies as well, including the widow's or widower's rights under this Schedule.

Time also lifts the fetter on sale by personal representatives within the first twelve months after the grant. The relevant paragraph is 4 (1) of the Schedule and it is in the following terms :—

> " During the period of twelve months mentioned in para. 3 of this Schedule the personal representative shall not without the written consent of the surviving husband or wife sell or otherwise dispose of the said interest in the dwelling-house except in the course of administration owing to want of other assets."

I wonder if all personal representatives of intestates and their solicitors are aware of this provision ?

Apparently, the Schedule confers no right to appropriation where the surviving spouse is the sole personal representative, and in such cases the normal rule which prevents a trustee from purchasing the trust property is not removed (see para. 5 (1)). But where issue survive no problem is likely to arise, for according to value a widow would either take the whole of her husband's estate outright or a life-interest in half the residue, and in the latter case she could not take the grant alone. (Admittedly she could take it with another who might die before the notice was served.) Where no issue survive, she may be well advised to take a joint grant and so protect her rights under Sched. II. This appears to be a reversal of the usual line of thought on these occasions.

" Escrow "

RENT ACT PROBLEMS

Readers are cordially invited to submit their problems, whether on the Rent Act, 1957, or on other subjects, to the " Points in Fractice " Department, " The Solicitors' Journal," Oyez House, Breams Buildings, Fetter Lane, London, E.C.4, but the following points should be noted :

1. Questions can only be accepted from registered subscribers who are practising solicitors.

2. Questions should be brief, typewritten *in duplicate*, and should be accompanied by the sender's name and address *on a separate sheet*.

3. If a postal reply is desired, a stamped addressed envelope should be enclosed.

Decontrol—Lease Providing for Payment of Increased " Statutory Rent "

Q. We act for a tenant of a flat the rateable value of which at the date of the lease was £35, and on re-valuation on 6th July, 1957, it was increased to £45. The lease of the premises is dated 28th May, 1948, and our client is an assignee. Clause 1 (*c*) of the lease reads as follows : " Such further amount of rent as the lessor is entitled to charge as a statutory rent having regard to any legislation which had or will be enacted by Parliament in the course of time this further rent not to exceed 75 per cent. of the existing statutory rent now chargeable to the premises hereby demised and if and when such legislation is passed by Parliament and it comes into being then and in such case the additional rent shall be paid without any deduction on the next day for payment of rent." On the passing of the Rent Act, 1957, we took the view in short that the effect of the clause in the lease has been vitiated (or would be from October, 1958), in view of the fact that control and the fixed rental would be removed from this flat were the client holding on a statutory tenancy. In other words, the draftsman of the clause could not foresee the removal of the protection of the Rent Acts and the abolition of the fixed rentals under that Act when the clause was drafted. However, our original opinion, it seems, is wrong in view of the Landlord and Tenant (Temporary Provisions) Act, 1958, and we should be most grateful if you would let us know whether you think that the new rental which our client could be charged were he not a lessee fixes the upper limit for this clause.

A. We presume that the dwelling-house is decontrolled by virtue of s. 11 (1) of the Rent Act, 1957. The 1958 Act only applies to dwelling-houses coming within the transitional provisions of the Fourth Schedule to the Rent Act, 1957. This the premises could only do if the lease were terminable by notice to quit or effluxion of time before 6th October, 1958. If the lease is not so terminable, the 1958 Act not being applicable, there are no provisions increasing " the statutory rent " of the premises and accordingly the clause can have no application as it is impossible to quantify the amount of any increase payable under it. If the lease is so terminable then the 1958 Act will not apply until notice on Form S has been served determining the transitional provisions of the Fourth Schedule to the Rent Act, 1957 (s. 1 (2) of the 1958 Act). The increase in rent under the 1958 Act will not be payable until that notice has expired, by which time the tenancy will have ceased to be a contractual tenancy and will have become a statutory one and the provisions in the contractual tenancy as to rent will no longer be applicable (see *Capital and Counties Properties, Ltd.* v. *Butler* [1944] K.B. 730).

Notice of Increase—Validity—Insufficient Rent Demanded

Q. Our client has entered into a contract to purchase a number of cottages. Prior to the contract the vendor gave to the tenants notices of increase under the Rent Act, 1957, in accordance with Form A. The notices provided that the rent limit should be $1\frac{1}{3}$ times the 1956 gross value. As a result of investigating the matter we find that the

original tenancies were weekly tenancies under which there was no agreement as to repairs, and it would appear to follow from this that the landlord would be responsible for all internal and external repairs and the tenant responsible for internal decorations. The Rent Act does not give the landlord a right to elect as to his responsibility for repairs, although he can elect to carry out internal decorations. We therefore consider that the notice of increase was bad, because the vendor was endeavouring to impose upon the tenant a higher liability than was possible under the original tenancy. Since the delivery of Form A the tenant has delivered to the vendor a notice of disrepair in accordance with Form G and the local authority has also delivered a notice of proposal to issue a certificate of disrepair in accordance with Form J. The effect of this appears to be that the tenant has accepted the original notice and has accordingly accepted that his original tenancy made him liable for repairs. If we are correct in our assumption that the original notice was bad, do you consider that the tenant has, by his own action, validated the original notice and in effect created a new statutory tenancy, or must the original notice be withdrawn and a new notice claiming an increase sufficient to raise the rent to twice the November, 1956, gross value be delivered?

A. In our opinion the original notice was not bad. Admittedly, the tenant's liability for repairs could not be varied by service of the notice (see *Winchester Court, Ltd.* v. *Miller* [1944] K.B. 734), and accordingly the landlord could have increased the rent to twice the gross value. However, a mistake of demanding too little as opposed to demanding too much will not invalidate a notice of increase (see *Thompson* v. *Ure* [1925] S.L.T. 122 and *Goldsmith* v. *Arlidge* [1924] E.G.D. 38).

Schedule IV—Yearly Tenancy—Determination—Form S Served

Q. Our client is the tenant of a flat on a yearly agreement from 24th June, 1951, "determinable on the 24th day of June in any year by either party giving to the other at least two quarters' previous notice in writing." The flat became decontrolled on 6th July, 1957, but no notice to determine the yearly tenancy has been given. The landlord's executors have served a Form S notice dated 31st July, 1958, to give up possession on 2nd February, 1959. The landlord's solicitors contend that the position is governed by para. 2 (5) of Sched. IV to the 1957 Act. They argue that as the tenancy *might* have come to an end within fifteen months of the time of decontrol (para. 2 (1)) and this tenancy *could* have been terminated by notice to quit given before 25th December, 1957, the Form S notice, being otherwise in order, is effective. The landlord's contention appears to be borne out by your answer No. 105 on pp. 61 and 62 of "The Rent Act in Practice," but we find that difficult to fit in with the opinion given on p. 580 of your issue of 9th August, 1958. We are inclined to think that the landlord's solicitors' contention is correct, having regard to the words italicised above, but the point does not appear to be free from doubt.

A. The clue to the discrepancy is, we consider, the "immediately before the time of decontrol" of para. 2 (1) of Sched. IV. No order having been made under s. 11 (3), the time of decontrol is 6th July, 1957, in each case; the date to be specified in a notice under para. 2 (1) (a Form S notice) is, by sub-para. (2), to be not earlier than fifteen months after the time of decontrol, i.e., 6th October, 1958, *and* not earlier than six months after the service of the notice. Now the point dealt with in "The Rent Act in Practice" arose in July, 1957, more than six months before 6th October, 1958, and both a common-law notice to quit and a Form S notice to determine right to retain possession could then be served: if a Form S notice alone were served, sub-para. (5) would, it was considered, operate. But the answer given on p. 580 of our issue of 9th August, 1958, was based on the view that a Form S could not terminate a tenancy "terminable by notice to quit" on a date before a common-law notice to quit could terminate it. We do not, therefore, agree with the landlord's executors' solicitors' contention in the case submitted, though we would not dispute the proposition that the point does not appear to be free from doubt.

REVIEWS

Modern Equity. Seventh Edition. By Harold Greville Hanbury, D.C.L. 1957. London: Stevens & Sons, Ltd. £3 15s. net.

Nobody reads books about equity for amusement. The subject is only studied with a view to making some kind of a livelihood by its application or exposition. A practical approach to the subject is therefore everything; without it no amount of learning (and none of the author's critics have ever charged him with any lack of that) can stimulate the student's flagging brain as chapter follows chapter on subjects as disparate as those which, for lack of a better technique, are still lumped together and taught together as "Equity."

"Modern Equity" has been mainly criticised in its earlier editions for a somewhat over-academic approach, and for a style too exuberant for so sober a collection of doctrines. But gradually much of the book has been rewritten, and the rewriting has taken most of the sting out of the earlier complaints, and this process continues. In this edition the chapter on the maxims and on the relations of equity and common law have been replaced by chapters on "Equitable Ideas in Property" and "Equitable Ideas in Contract." The former permits the author to treat at proper length such matters as relief against forfeiture without displacing anything of value, for the rules which the maxims are said sometimes to exemplify and sometimes to have founded are all dealt with at length elsewhere. A new chapter appears on "Declaratory Judgments," a type of judgment of growing importance, as the author rightly says, when in the now not infrequent disputes between one of the ever-increasing number of bodies created or protected by statute and an individual the latter is constrained to establish his status, on which his whole livelihood may depend. (The suggestion in this chapter that the courts prefer this type of judgment to an injunction as being less drastic is, however, not borne out by experience: a continuing tort almost always entitles a plaintiff to an injunction, the relief of a declaration coupled with liberty to apply for an injunction being widely recognised as unfair on a successful plaintiff.) The chapter on charitable trusts has had to be rewritten, the preface tells us, because of, among other things, the Charitable Trusts (Validation) Act, 1954. This chapter certainly deals adequately with the important House of Lords decisions of the last few years, but as to the Act, the account here given will seem very sketchy to anyone who has recently struggled with the complexities of the *Gillingham Bus Disaster Fund* case. The full account of the law of intestate succession has, of course, been brought up to date, and the developing law on licences (including the controversial cases on the deserted wife and the matrimonial home) now has a valuable section to itself.

But the book still has defects, the most noticeable being the chapter on restrictive covenants, which is quite the weakest in the whole volume. Starting off with the *Prior's* case (a strange beginning for a chapter on *restrictive covenants*) it wanders from point to point, with no apparent method. This would have been understandable, and perhaps excusable, twenty years ago, but in that period two practitioners' manuals have appeared which, one would have thought, had established for all time that there is only one method of giving instruction in this subject—by the strict separation of the topics of burden and benefit,

and as regards benefit by its treatment by reference to the three rules which alone are recognised as conferring a title to enforce on a successor of the covenantee (*Re Pinewood Estate, Farnborough* [1958] 1 Ch. 280). And here, in a section on s. 56 of the Law of Property Act, 1925, is a brief glimpse of the old Adam in the author, as he laments the failure of the courts to take the opportunity of the wider language of s. 56 (1), as compared with that of its predecessor, s. 5 of the Real Property Act, 1845, of opening the door "to a bold and progressive development concerning not only restrictive covenants but third party contracts generally." But is it the function of the courts to apply a section in a law of property statute (one of a *fasciculus* headed "Conveyances and Other Instruments" at that) to contracts? We have a law reform committee, and if the law of contract needs extension in the direction indicated by the author (and there are good reasons, not unconnected with the practical problem of taxation, why all conveyancers would not welcome it), the proper medium of reform is a Law Reform Bill, after a thorough investigation has been made of its desirability.

The Law of Real Property. By R. E. MEGARRY, Q.C., M.A., LL.B., of Lincoln's Inn, and H. W. R. WADE, M.A., of Lincoln's Inn, Barrister-at-Law. 1957. London: Stevens and Sons, Ltd. £3 3s. net.

This statement of the English law of real property is put forward by the authors in the hope that it will be "intelligible to students and helpful to practitioners." Improbable as this double claim may sound at first, it is largely realised. The more serious student, especially one with some interest in our social as well as our legal history (the law of real property has at every stage in its development reflected social trends) will find here much more than will be required of him by the examiners for the professional examinations. The exposition is perhaps too long (999 pages of text), but its length is partially disguised by the ease with which it reads. The practitioner will not find the detail which he mostly requires, but if a conspectus of a whole subject is what he wants, this is the place to look for it. There is nothing better in this field: see (to choose two examples almost at random) the pages on the binding trust for sale controversy (pp. 334 *et seq.*), and the opening pages of the chapter on covenants affecting land, on the principles on which such covenants are enforced (pp. 651–3).

In the detail, one can pick faults. In the chapter on covenants already mentioned, for example, which opens so excellently, it simply is not true to say (p. 675) that "the heart of the subject will be found in the rules about burden": in the great majority of cases which reach the courts covenants are found to be unenforceable because title cannot be shown to the benefit. And, again in this chapter, the recent *Newton Abbott* case is cited twice, on different points, without a mention of its highly controversial content as a decision on what constitutes "ascertainable land." There is also an occasional tendency, despite the book's length, to compression to the point (alas the professions in the preface!) of unintelligibility—see, e.g., the description of a common recovery on p. 82, which sent this reviewer to a rival publication to clear his mind; and the first note on p. 243, which to its cryptic quality adds the sin (in a book on real property) of irrelevance. Here and there, on the other hand, some compression should be possible by omission; on p. 208, for example, a rule is described in some detail only to be dismissed as having been rejected by the best authority since the time of Coke—indeed, as having perished almost as soon as it drew breath. We could spare notice of birth and death alike.

But these are small faults in a book which is made impressive by the width of its authors' views and the accuracy of their learning, and pleasant to read by the ease of their style. One point which should be looked to in a new edition is the proof-reading, which is not up to the standard (a high one) of these publishers and their printers.

Swift's Housing Administration. Fourth Edition. By STEWART SWIFT, M.B.E., and FREDERICK SHAW, D.P.A., M.R.S.H., A.M.I.P.H.E. 1958. London: Butterworth & Co. (Publishers), Ltd. £4 7s. 6d. net.

This new edition of a book well known in local authority public health departments, written by two experienced public health inspectors, is not really designed for lawyers. It is even too technical and practical for use by them more than occasionally at housing inquiries. Having said this, we must add that it remains a most important and useful tool for those for whom it was written, the public health inspectors and, to a somewhat less extent, the housing managers.

Since the third edition was published in 1947, the Legislature has made many changes in housing law, and these have been well woven into the text. The authors often print extracts from the statutes, but they do not hesitate to give their own views on interpretation, and guidance on practical matters. We are not sure whether we agree with the advice given (at p. 246) on the subject of the medical officer of health being called at an enquiry regarding a clearance area—or presumably, in court proceedings arising out of a demolition order. The M.O.H. is the senior public health officer of the local authority, and we should have thought his evidence—admittedly in general terms, leaving the details to be sketched in by the public health inspector—to be essential in any such proceedings of any complexity or importance.

The book is generously equipped with photographs and tables and has a good index.

IN WESTMINSTER AND WHITEHALL

STATUTORY INSTRUMENTS

Export of Goods (Control) (Amendment No. 3) Order, 1958. (S.I. 1958 No. 1417.) 7d.

Fowl Pest (Infected Areas Restrictions Amendment Order, 1958). (S.I. 1958 No. 1442.) 6d.

Higham Ferrers and Rushden Water Board (Ditchford Works) Order, 1958. (S.I. 1958 No. 1428.) 5d.

Import Duties (Exemptions) (No. 18) Order, 1958. (S.I. 1958 No. 1439.) 5d.

Import Duties (Exemptions) (No. 19) Order, 1958. (S.I. 1958 No. 1440.) 5d.

Iron and Steel Scrap (Revocation) Order, 1958. (S.I. 1958 No. 1432.) 4d.

London-Canterbury-Dover Trunk Road (Harbledown By-Pass) Order, 1958. (S.I. 1958 No. 1423.) 5d.

London-Carlisle-Glasgow-Inverness Trunk Road (Barton-in-the-Clay Diversion) Order, 1958. (S.I. 1958 No. 1437.) 5d.

Retention of a Pipe Forming a Sewer under a Highway (County of Bedford) (No. 1) Order, 1958. (S.I. 1958 No. 1418.) 5d.

Retention of Cable, Main, Sewers and Drains under Highways (County of Gloucester) (No. 1) Order, 1958. (S.I. 1958 No. 1419.) 5d.

Retention of Cables, Mains and Pipes under and over Highways (County of Hertford) (No. 2) Order, 1958. (S.I. 1958 No. 1420.) 5d.

River Purification Authority (Commencement No. 10) Order, 1958. (S.I. 1958 No. 1426 (C.9) (S.65).) 5d.

Safeguarding of Industries (Exemption) (No. 5) (Amendment) Order, 1958. (S.I. 1958 No. 1441.) 4d.

Stevenage Development Corporation (Water Charges) Order, 1958. (S.I. 1958 No. 1438.) 4d.

Stopping up of Highways (County of Glamorgan) (No. 9) Order, 1958. (S.I. 1958 No. 1433.) 5d.

Stopping up of Highways (County Borough of Grimsby) (No. 1) Order, 1958. (S.I. 1958 No. 1431.) 5d.

Stopping up of Highways (County of Lancaster) (No. 25) Order, 1958. (S.I. 1958 No. 1422.) 5d.

Stopping up of Highways (County of York, West Riding) (No. 14) Order, 1958. (S.I. 1958 No. 1421.) 5d.

Wages Regulation (Milk Distributive) (Scotland) (Amendment) Order, 1958. (S.I. 1958 No. 1443.) 5d.

NOTES AND NEWS

Honours and Appointments

Mr. PETER DEREK GREEN, assistant solicitor to Barnsley Corporation, has been appointed deputy town clerk of Grantham.

Personal Notes

Mr. S. Hewitt has resigned the post of assistant solicitor to Crewe Corporation.

Mr. Mervyn Phippen Pugh, D.S.O., M.C., solicitor, retires this month from his post as prosecuting solicitor for Birmingham.

Mr. D. A. Stroud, retired solicitor, of Wallington, and his wife have just celebrated their golden wedding.

Miscellaneous

GENERAL COUNCIL OF THE BAR

SERVICE AT WESTMINSTER ABBEY, WEDNESDAY, 1ST OCTOBER, 1958

On the occasion of the re-opening of the Law Courts a Special Service will be held in Westminster Abbey on Wednesday, 1st October, 1958, at 11.45 a.m., which the Lord Chancellor and Her Majesty's judges will attend. Members of the Junior Bar and Bar Students wishing to attend the Service must notify the Secretary of the General Council of the Bar not later than Friday, 26th September. Barristers attending the Service must wear robes. Students must wear students' gowns. All should be at the Jerusalem Chamber (Dean's Yard entrance), where robing accommodation will be provided, not later than 11.30 a.m. After the Service, members of the Junior Bar and Students who have not received and accepted invitations to the Lord Chancellor's Reception are advised to leave the procession to the House of Lords before it emerges from the Abbey and to find their way back to the Jerusalem Chamber via the South Choir Aisle and the Nave. An attendant will be present at the point where the procession crosses the South Choir Aisle. A limited number of seats will be available for relations and friends of members of the Bar and admission to these seats will be by ticket only. Applications for these tickets should be made :—

(*a*) By Queen's Counsel direct to Mr. John Hunt, Crown Office, House of Lords, S.W.1.

(*b*) By members of the Junior Bar to the Secretary of the General Council of the Bar, Carpmael Building, Temple, E.C.4.

Ticket holders must be in their seats by 11.30 a.m.

Wills and Bequests

Mr. John Waldon Bowker, solicitor, of Whittlesey, left £52,140.

Mr. Ernest James Winter, solicitor, of Reading, left £14,947 0s. 2d. (£14,705 12s. 8d.).

OBITUARY

MR. R. M. BORM-REID

Mr. Robert McMinn Borm-Reid, solicitor, of London, W.8, died on 1st September. He was admitted in 1932.

MR. R. COHEN

Mr. Ralph Cohen, solicitor, of Blackpool, died on 29th August, aged 45. He was admitted in 1936.

MR. W. L. PLATTS

Mr. Walter Leslie Platts, Clerk of Kent County Council and Clerk of the Peace for Kent from 1929 to 1953, died on 26th August, aged 73. He was admitted in 1908, and, before going to Kent County Council, had occupied posts as assistant solicitor to Reading County Borough, deputy town clerk of Hull, and, from 1921 to 1929, clerk of Cornwall County Council.

CASES REPORTED IN VOL. 102

5th July to 6th September, 1958

For cases reported up to and including 28th June, see Interim Index

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